86-1468

No.

In the Supreme Court of the United States

October Term, 1986

BSP INVESTMENT and DEVELOPMENT, LTD.
PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government is entitled to judicial forfeiture of currency under the Currency and Foreign Transactions Reporting Act where owners had no knowledge of the reporting requirement and were never given a timely opportunity to report.

2. Whether the practice of the United States Customs Service always to provide written reporting information and declaration forms to persons entering this country by airplane but never to those entering by automobile constitutes disparate treatment in violation of the Equal Protection Clause.

PARTIES TO THE PROCEEDING

Petitioner BSP Investment and Development, Ltd., (claimant in the district court and appellant in the court of appeals) is the owner of Forty-Seven Thousand Nine Hundred Eighty Dollars ($47,980) in Canadian Currency (defendant in the district court).

Respondent is the United States of America (plaintiff in the district court and appellee in the court of appeals).

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No.

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BSP INVESTMENT AND DEVELOPMENT, LTD., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The third and final opinion of the court of appeals (App., *infra*, la - __a) is reported at 804 F. 2d 1085. The opinion of the district court (App., *infra*, 10 a - a) made after trial is not reported. The second opinion of the court of appeals (App., *infra*, 20 a - __a), is reported at 726 F.2d 532. The first opinion of the court of appeals (App., *infra*, 30 a - - a), is reported at 689 F.2d 858. The opinion of district court (App., *infra*, 40 a - - a), initially granting summary judgment to petitioner, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1986. A timely petition for rehearing filed December 2, 1986 was denied on January 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The two sections of the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5316 and 5317, are set forth in App., *infra*, 50 a - - a).

STATEMENT

This petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit determining that the United States could obtain forfeiture of currency seized from Canadians entering the United States by automobile.

William A. Stark and Robert J. Pascoe, who are the principals of BSP Investment and Development, Ltd., an Alberta corporation, drove from Calgary to Eastport, Idaho, arriving at the Port of Entry at 9:30 p.m. on February 22, 1979. They were coming to the United States to buy classical motor vehicles such as T-Birds to bring back to Canada for renovation and sale at higher prices. RT., p. 69, L. 9-19.

Pascoe and Stark had with them $47,980 in Canadian currency placed in envelopes on which was printed the logo name of BSP Investment and Development, Ltd. On the outside of each envelop a dollar amount had been written stating the exact amount contained within the envelope. RT., p. 75, L. 3-11. The envelopes were contained in a brief case which had been placed in open view on the back seat of the automobile. RT., p. 10, L. 21-23.

Upon arrival at Eastport the customs inspector, Walter L. Wilson, commenced routine questioning and inspection and observed the briefcase in the back seat. RT., p. 10, L. 21-23. With the readily given permission of Pascoe and Stark, Inspector Wilson opened the briefcase and saw the envelopes. He then asked "if they were carrying over $5,000 in cash or negotiable bonds or instruments of any kind." RT., p. 10, L. 24-25; p. 11, L. 1-2.

In responding to Inspector Wilson's question, Pascoe lied. Inspector Wilson testified that Pascoe said that they had approximately $4,000. RT., p. 11, L. 16-17.

Inspector Wilson asked that the briefcase be brought inside the customs office and Pascoe and Stark willingly complied. RT., p. 11, L. 19-25; p. 12, L. 1.

At the request of Inspector Wilson, three envelopes were removed and opened. Inspector Wilson with Stark counted out $12,000 in Canadian currency. According to Inspector Wilson,

Pascoe then said he would like to declare the $12,000. RT., p. 28, L. 24-25.

Inspector Wilson had the Currency Report Form 4790 in his office, but he never made it available to either Pascoe or Stark. RT., p. 29, L. 10-15.

Pascoe and Stark testified that they were totally unaware of the currency reporting requirement until after the initial $12,000 had been counted. RT., p. 79, L. 22-25; p. 80, L. 1-10; p. 128, L. 10-15, 24-25; p. 129, L. 1-2. Neither Pascoe nor Stark were orally advised that carrying over $5,000 is legal if reported, nor were they orally advised of the consequences of failure to report.

After the $12,000 was counted out, Pascoe asked why Inspector Wilson had used "$5,000" as the figure in his initial inquiry. RT., p. 12, L. 16-17. Inspector Wilson told Pascoe to look at "the poster on the Currency Reporting Act" which was on the bulletin board. RT., p. 12, L. 17-19.

Pascoe again asked "why the $5,000?", and Inspector Wilson told him that a form had to be filled out "for control of illegal money into and out of the United States". RT II, p. 14, L. 7-11. Pascoe responded that "he thought it was an IRS form and that he did not wish to be bothered by the IRS". RT II, p. 14, L. 12-16.

This statement, referred in both the district and appellate court opinions (App. *infra*, pp. ____ and ____; 804 F. 2d at 1087), confirmed the ignorance of Pascoe and Stark about the reason for the reporting requirements which have nothing to do with the Internal Revenue Service.

After the $12,000 had been counted, Inspector Wilson asked Pascoe and Stark what was in the other envelopes. RT., p. 14, L. 25; p. 15, L. 1. They replied, "more currency", which was self evident from the dollar amounts written on the envelopes. RT., p. 15, L. 1-2.

The remaining envelopes were then opened with the cooperation and assistance of Pascoe and Stark and the total amount of $47,980 in Canadian currency was established. RT., p.17, L. 2-7.

As far as Inspector Wilson was concerned, Pascoe and Stark had no right to know anything about the reporting requirement and he had no duty or responsibility to tell them anything. RT., p. 32, L. 14-22. The government did not contend and introduced no evidence to show that either Pascoe or Stark had any knowledge of the currency reporting requirements.

Inspector Wilson testified that the United States Customs Office policy was that an entrant would never be given a form for declaration unless he stated that he had more than $5,000. RT., p. 23, L. 7-18. When Pascoe stated that he had $4,000, he immediately thereupon lost any right to change his statement or make any declaration as to any higher amount according to Inspector Wilson:

> Wilson: They had made a verbal declaration at the time that they did not have $5,000 in cash, and once the proceedings had gone past that, if anything is found, it is not required that we give it to the subjects. It is subject to seizure.
> RT., p. 21, L. 15-20.

Inspector Wilson stated that there was a customs office policy in a published directive that a person who makes an oral statement of having less than $5,000 was never to be presented with a declaration form regardless of any subsequent change in circumstances. RT., p. 23, L. 22-25; p. 24, L. 1-11. The government did not produce any such written directive and none is contained in the applicable regulations published in the Code of Federal Regulations. RT., p. 24, L. 14-25; p. 25, L. 1-3. 31 CFR 103-21 to 103.26.

As far as Inspector Wilson was concerned the United States Customs policy compelled him to seize the currency whenever the amount discovered was over $5,000. RT., p.23, L. 7-18. The first utterance relating to currency made by an entrant was binding regardless of any knowledge about the requirement to report currency over $5,000 or the legality of carrying more if reported.

Pascoe and Stark cooperated through the entire proceeding according to Inspector Wilson without making any attempt to leave or retreat with their money. RT., p. 41, L. 10-15. Inspector Wilson testified that both had responded to all questions and withheld nothing during the entire rest of the investigation. RT., p. 43, L. 3-11.

There is absolutely no information in the record that Pascoe and Stark were engaged in or intending to engage in any criminal activity whatsoever. As far as the trial record reveals, the sole purpose of their coming to the United States was to purchase automobiles. RT., p. 69, L. 8-19.

After the total count had been made, Pascoe and Stark again expressed the desire to fill out the proper forms or alternatively,

to take their money back to Canada and straighten the matter out the next day. RT., p. 84, L. 2-13; p. 132, L. 22-25; p. 133, L. 1-3. Instead the customs officials locked the currency in the safe. RT., p. 19, L. 13-22.

Pascoe and Stark returned to Calgary and contacted their attorney who started correspondence in an attempt to recover the money. Exhibit 106. The government conducted an investigation and determined on August 13, 1979 that criminal action was not warranted. Exhibit 114. The administrative review dragged on until the United States Attorney filed a complaint for forfeiture on April 1, 1980. CR 1 Excerpt at 1-2.

The Honorable Fred M. Taylor, United States District Judge for Idaho, granted summary judgment in favor of the claimant on June 23, 1981 on three separate grounds: excessive delay in instituting judicial forfeiture proceeding, denial of entry eliminating the requirement to report and failure of the government to furnish the reporting form. App. *infra*, ____ .

The Ninth Circuit Court of Appeals initially affirmed the summary judgment based upon 14 months being a denial of due process. App. *infra*, a ____ , 689 F. 2d 858. The United States obtained a stay pending a decision by this court in *United States v. Eight Thousand Eight Hundred Fifty Dollars ($8,850)*, 645 F. 2d 836 (9th Cir. 1981). In *$8,850* this Court determined that delay alone did not constitute a violation of due process. 461 U.S. 555 (1983).

Based on the decision in *$8,850*, the Ninth Circuit reversed its previous holding and remanded the case for judicial application of the four factors established in *Barker v. Wingo*, 407 U.S. 514 (1972). App. *infra*, 10a - , 726 F. 2d 532 (1984). The opinion also held that there was sufficient factual dispute to preclude summary judgment against the government based on a lack of opportunity to report or lack of knowledge of the reporting requirement. App., *infra*, ____ 726 F. 2d at 535.

After trial on remand, Judge Taylor entered judgment in favor of the government. App., *infra*, 20a -. That decision was affirmed on appeal by two judges with Judge Stephens dissenting:

> As the forfeiture statute, 31 U.S.C. Section 1101 (recodified as 31 U.S.C. Section 5316) has evolved through judicial interpretation, one bite at a time, it has lost almost all semblance of fairness, as fairness is viewed by the ordinary citizen. I invite attention to Judge Beezer's dissent and espe-

cially footnote 9 in *United States v. One Hundred Twenty-Two Thousand Forty-Three Dollars ($122,043.00) in United States Currency*, 792 F. 2d 1470 (9th Cir. 1986). Judge Beezer's concern arises out of a requirement to report currency when leaving the United States while our Canadian Currency case involves entry into the United States, but both cases involve situations where the person transporting the currency may not be aware of the requirement to report the currency. The Secretary could avoid one major element of unfairness by requiring that all persons entering or leaving the United States be given a written explanation of the reporting requirements before any questions are asked concerning transportation of currency.
App. *infra*, ____ , 804 F. 2d at 1091.

REASONS FOR GRANTING THE PETITION

1. Knowledge Should Be Required For Civil Forfeiture

The decision of the Ninth Circuit Court of Appeals is in direct conflict with the decision of the Eleventh Circuit Court of Appeals in *United States v. One (1) Lot of Twenty Four Thousand Nine Hundred Dollars ($24,900) in United States Currency*, 770 F. 2d 1530 (11th Cir. 1985). That decision held that allowing the United States Customs office to forfeit currency without informing the entering traveller of the reporting requirements and without providing a reporting form violated the Bank Secrecy Act of 1970[1] which was intended to require reporting, not to seize money from innocent travellers. 770 F. 2d at 1534-1535.

The conflict between the circuits creates entirely different guidelines for customs officials in determining seizure and forfeiture within the respective circuits which include nine states for the Ninth Circuit and Florida, Alabama and Georgia for the Eleventh Circuit.

A. Ninth Circuit: No Knowledge Required for Forfeiture.

The decision of the Ninth Circuit in this case relied upon a similar conclusion in *United States v. One Hundred Twenty-Two Thousand Forty-Three Dollars ($122,043.00) in United States Currency*, 792 F. 2d 1470 (9th Cir. 1986), decided four months earlier after this case had been argued. Here the opinion states that "several courts have held that knowledge of reporting requirements is not required for civil forfeiture". App., *infra*, la __, 804 F. 2d at 1090.

The three cases cited in support of this proposition are district court opinions, one within the Ninth Circuit[2] and one from Florida

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[1] The Bank Secrecy Act of 1970 was held to be constitutional in *California Bankers Association v. Shultz*, 416 US 21 (1974). The relevant provisions were readopted as part of the Currency and Foreign Transactions Reporting Act. (September 13, 1982, P.L. 97-258, Sec. 1, 96 Stat. 999.)

[2] *United States v. Eight Hundred Thirty One Thousand One Hundred Sixty Dollars and 45/100 ($831,150.45) in United States Currency*, 607 F. Supp. 1407 (N.D. Cal. 1985) aff'd without opinion, 785 F. 2d 317 (9th Cir. 1986).

in 1981[3] which would be contrary to the present holding of the Eleventh Circuit. *$122,043.00* was also a split decision with Judge Beezer dissenting:

> Civil forfeiture is such a harsh penalty that a reasonable degree of definiteness in the governing statute or regulation should be required before imposing it upon an individual. The point at which the duty to file a currency report arises should be delineated with such specificity that it does not encourage arbitrary enforcement by customs agents, *see Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983), and that it affords fair warning of the point at which the duty to report is activated such that individuals can reasonably rely upon it in regulating their own conduct, *see Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 502, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).
> 792 F. 2d at 1479.

B. Eleventh Circuit: Knowledge Required for Forfeiture.

The Eleventh Circuit in *$24,900, supra*, squarely held that proof of a scienter was an essential element of a civil forfeiture case:

> There is nothing illegal in transporting currency across the border. Only the failure to report gives rise to any liability. *See Warren*, 612 F. 2d at 891; *Granda*, 565 F. 2d at 926. Particularly when the Act was first passed, travellers were not likely to know about the requirements or even to suspect there may be any such reporting requirements. Thus, the purpose of the Act — obtaining reports — could only be achieved if travelers were made aware of the reporting requirement. If one is unaware of the reporting requirement, one cannot be expected to comply, notwithstanding the possibility of a subsequent forfeiture, or any other sanctions.

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[3] *United States v. Four Million Two Hundred Fifty Five Thousand Six Hundred Twenty Five Dollars and 39/100 ($4,255,625.39)*, 528 F. Supp. 969 (S.D. Fla. 1981). A footnote in *United States v. One (1) Lot of Twenty Four Thousand Nine Hundred Dollars in U.S. Currency ($24,900), supra*, noted the district court opinion in *$4,255,625.39* and explicitly rejected the interpretation that knowledge of the reporting requirement was not required. 770 F. 2d at 1535, n. 12.

> To interpret "knowingly" as used in the reporting requirement as not requiring knowledge of the reporting requirements would in effect mean that travellers need not be made aware of the reporting requirements: even if a criminal action could not be brought absent knowledge, a forfeiture action and perhaps other actions could. We find that such an interpretation of "knowingly" would fly in the face of Congress' goal of obtaining currency reports. Cf. Granda, 565 F. 2d at 926 ("Since the purpose of all law . . . is to conform conduct to the norms expressed in that law, no useful end is served by prosecuting the 'violators' when they have no knowledge of the law's provisions.")
> 770 F.2d at 1534-1535.

The court took note of and rejected the emerging contrary view of the Ninth Circuit as derived from *Ivers v. United States*, 413 F. Supp. 394, 401 n.9 (N.D. Cal. 1975), *aff'd in part and rev'd in part on other grounds*, 581 F. 2d 1362 (9th Cir. 1978). 770 F. 2d at 1535, n. 12.

The decision of the three judges in *$24,900* was based upon the *en banc* decision of the Fifth Circuit in *United States v. Warren*, 612 F.2d 887 (5th Cir. 1980), which involved individuals who had entered by boat with $41,500 in U.S. dollars plus Columbian pesos and had repeatedly lied about the amounts in their possession.

Although divided upon another issue, the fourteen judges *en banc* panel unanimously concurred in reversing the Warren convictions because of lack of proof that the defendants knowingly failed to report. Judge Brown wrote for all as follows:

> In enacting the currency reporting statutes, moreover, Congress sought to avoid damage to international trade and commerce. Incident to that concern was an appreciation that travelers are both a part of and creators of international trade and commerce.
>
> Furthermore, requiring notice of the responsibility to report the existence of currency before imposing criminal consequences fits in with the statutory scheme. The act of taking money in excess of $5,000 out of the country " is not illegal or even immoral. What is required is merely a filing of the proper form". *Granda, supra*, at 926. In most cases, the mere transportation of money is an *innocent act*, more akin

> to being present in a city than to transferring weapons. (Emphasis in opinion.)
> 612 F.2d at 891.

C. Ninth Circuit: Eleventh Circuit View Rejected.

In *$122,043.00* as it did later in this case the Ninth Circuit explicitly took notice of and rejected the interpretation of the Eleventh Circuit:

> In *United States v. One (1) Lot of $24,900 in U.S. Currency*, 770 F.2d 1530, 1533 (11th Cir. 1985), that court held that, because knowledge of the reporting requirement is an element of a criminal violation of section 5316, it must also be an element of the civil offense defined by the same statute. We respectfully disagree. In our view, the criminal violation is defined by section 5322, a statute that punishes willful violations of the Currency and Foreign Transaction Reporting Act.
> 792 F. 2d at 1476.

The Second Circuit has made observation of the conflict between the Ninth and Eleventh Circuits as to whether awareness of the reporting requirement was an element in the civil forfeiture action but avoided the issue in *United States v. Twenty-Six Thousand Six Hundred Sixty Dollars ($26,660) in U.S. Currency*, 777 F.2d 111, 112 (2nd Cir. 1986).

In this case it appears that the government made the precise distinction adopted by the Ninth Circuit. It determined against criminal prosecution of Pascoe and Stark because it could not prove that they had knowingly transported the money in violation of the law.

The government then instituted civil forfeiture proceedings again on the assumption that knowledge of the reporting requirements was not a required element of its case.

The government succeeded in the Ninth Circuit. It lost in the Eleventh Circuit. The other circuits have not yet decided. Resolution by this Court of the question as to whether knowledge is a required element in civil forfeiture should be in the government's best interest as well as in the interest of innocent travellers.

D. For Customs and for Travellers: Uncertainty.

The Eleventh Circuit encompasses the customs offices at the

international airports and along the southeastern Gulf coast. The Ninth Circuit includes customs offices at international airports in the western states, along the Pacific Coast and on the western borders with Canada and Mexico. The conflicting decisions create an intolerable situation among the nation's lower courts. The decisions of the federal appellate courts control and shape the manner in which the customs officials and the Department of Justice act.

As matters now stand, customs officials can institute civil forfeiture actions in the Ninth Circuit without the necessity of proving that the person entering knew of the reporting requirement. In the Eleventh Circuit which through Florida includes by far the largest number of cases, scienter is a necessary prerequisite.

The other circuits all include international airports and all but the District of Columbia and the Seventh Circuit have international or oceanic borders. In these other ten circuits the customs officials can only guess as to whether three judges in the Eleventh Circuit or four judges in the Ninth Circuit are right about scienter in a civil forfeiture action.

2. Disparate Treatment Violates Equal Protection Clause.

The second question presented points to discrimination in regard to currency reporting arising from the disparate treatment given by the United States Customs Service between travellers arriving by automobile and travellers arriving by airplane. The very substantial difference arises from agency practice. The currency reporting law applies the identical standard regardless of means of transportation or point of arrival.[4]

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[4] The pertinent portion of 31 U.S.C. Sec. 1101 recodified in 1982 as 31 U.S.C. Sec. 5316 reads as follows:

. . . , a person or an agent or bailee of the person, agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent or bailee knowingly—

(1) transports or has transported monetary instruments of more than $5,000 at one time—

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through a place outside the United States;

. . .

(b) A report under this section shall be filed at a time and place the Secretary of Treasury prescribes. . . .

A. Customs Regulations Provide No Guidance on Currency.

The United States Customs Service regulations simply require that anyone transporting more than the minimum amount in or out of the country make a report. 31 C.F.R. Sec. 103.23. Oral declarations of tangible goods are allowed in the discretion of the customs officer as an alternative to filling out Customs Form 6059-B. 31 C.F.R. Secs. 148.12 and 148.13.

There is no reference to oral declarations as to currency. There is no published support for Inspector Wilson's belief that policy forbids presentation of a reporting form to an entrant who has made an oral declaration of less than the minimum. Nonetheless it must be accepted that the policy and practice applied to persons arriving by automobile is exactly as testified to here. The government has not at any point suggested that Inspector Wilson misinterpreted policy.

B. Air Traveller Given Declaration Form.

When a traveller is arriving by plane, he or she is given a Customs Declaration Form 6059-B to be filled out and presented at the time he or she goes through customs. One question on the form asks, "Are you or anyone in your party carrying over $5,000 in coin, currency, or monetary instruments?" with a "Yes" or "No" box to be checked.[5] Ex. 130. In 1978 the form was modified, probably in response to appellate decisions critical of lack of notice, to add an additional admonition, "If 'Yes', you must file a report on Form 4790, as required by law".[6] Form 4790 is the approved form used for reporting over $5,000 in currency.

C. Automobile Traveller Given Nothing.

When a traveller arrives by automobile as Pascoe and Stark did at Eastport, he or she is not given Form 6059-B nor any writing of any kind requiring either an affirmative or negative declara-

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[5] The minimum amount was raised to $10,000 in 1984 but the remainder of the law was unchanged. P.L. 98-473, Title II, Ch IX, Sec. 901(c), 98 Stat 2135.

[6] In *United States v. Rodriguez*, 592 F. 2d 553 (9th Cir. 1979), the Court noted that Customs Form 6059-B had been changed by adding this sentence after the reversals of currency reporting convictions in *United States v. Schnaiderman*, 568 F. 2d 1208 (5th Cir. 1978), and *United States v. Granda*, 565 F. 2d 922 (5th Cir. 1978). 592 F. 2d at 557.

tion nor advising of any requirement to declare funds over $5,000 except from a cardboard poster posted in the customs station. Ex. 2.

Neither Pascoe and Stark nor any other traveller arriving by automobile is advised that carrying over $5,000 is legal if reported nor advised of the consequences of failure to report. The majority of the reported cases on forfeiture of money under the Bank Secrecy Act have involved seizures after entry at an international airport.[7] The strict interpretation placed upon conviction or forfeiture by the appellate courts in the airport arrival cases should make forfeiture in automobile entry cases even more difficult.[8]

The ironic consequence is that the international airline passenger is always given the full information and the duty to fill out the form making written declaration while the driver crossing into what may be a relatively remote and uninhabited part of the country is given no information and given no declaration to sign.

D. Disparate Treatment Infringes On Right Of Travel.

The policy discrimination is practical infringement upon the right of international travel which is a "liberty" protected by the Due Process Clause of the Fifth Amendment. *Califano v. Torres*, 435 U.S. 1, 4, n. 6 (1978). Currency and reporting requirements are not in the category of passports and do not involve the security interests of the nation. *Haig v. Agee*, 453 U.S. 280 (1981).

The legitimate government interest as set forth in the purpose clause is to require certain reports or records where they have a

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[7] The entrant by boat may be in either category. In *United States v. Warren, supra*, defendants were coming into Florida in their own sailboat. The person arriving on a commercial cruise ship would probably be treated in the same manner as the passenger arriving on the commercial airline.

[8] The difference in treatment was the basis for reversal of a failure to declare conviction in *United States v. San Juan*, 545 F. 2d 314 (2nd Cir. 1976). Mrs. San Juan arrived from Canada to the port of entry in Vermont on a bus with a brown package containing $77,500. The Customs Inspector did not give her the Customs Declaration Form 6059-B nor allow her to fill out the Form 4790 until after seizure of the money. Judge Feinburg observed that Mrs. San Juan probably thought that regardless of the amount "carrying cash in was illegal". 545 F. 2d at 318. The Court held: ". . . , the Government should make some effort to bring the reporting requirement to the traveler's attention". 545 F. 2d at 319.

high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. 31 U.S.C. Sec. 5311. The House Report on the Bank Secrecy Act of 1970 stressed the "high importance . . . not to create obstacles to the free flow of legitimate international travel and commerce".[9] H.R. Rep. No. 975, 91st Con., 2d Sess. *reprinted in* (1980) U.S. Code Cong. & Admin. News, pp. 4394, 4398.

E. Disparate Treatment Not Based on Rational Purpose.

The holdings of the Court on the Equal Protection Clause were summarized in *Zehr v. Robertson*, 463 U.S. 248 (1983):

> The concept of equal justice under law requires the State to govern impartially. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 487, 59 L.#d. 2d 587, 99 S. Ct. 1355 (1979). The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Reed v. Reed*, 404 U.S. 71, 76, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971). Specifically, it may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose. *Ibid.; Craig v. Boren*, 429 U.S. 190, 197-199, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976). 463 US at 265-266.

The differing reporting requirements applied in practice by the Customs Service will not satisfactorily answer any of the questions posed by Justice Stevens, concurring in *Cleborne v. Cleborne Living Center*, 473 US ____:

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis".
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> 87 L. Ed. 2d at 328-329.

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[9]There is no taint of illegality connected with the $47,980 or with either Stark or Pascoe. Their purpose in bringing in the money was to buy automobiles for refurbishing. The claimant was trying to engage in the very flow of commerce that Congress did not intend to impede.

Custom regulations allow arriving airline entrants complete written information on the reporting regulations. The automobile entrant has at most the opportunity to look at the poster without any further knowledge as to the reporting requirements or the consequences of failure to comply.

The legal duty is the same as to all persons coming into this country: a report must be made of all currency above the stated minimum. The Act does not say anything about the method of transportation, place of arrival or the nature of the encounter with the custom official.

The practice as developed creates a great discrimination entirely dependent upon the method of travel. Come by air and you fill out Form 6059-B stating how much you are carrying and designating the possibility of forfeiture for failure to report. Arrive by land and the declaration is oral, subject to the ignorance of the traveller and the interpretation of the particular customs inspector whom the traveller encounters.

F. Administrative Interpretation Not Entitled to Deference.

This is not a case in which the administrative interpretation and practice is entitled to great deference. The foremost concideration is the statute itself. Long standing interpretation by the governing agency will not withstand challenge contrary to the Congressional purpose. *Securities and Exchange Commission v. Sloan*, 436 U.S. 103 (1978).

The policy as applied by the United States Customs Service provides full information to the airline passenger and a yea or nay written declaration but gives limited information to an entrant by automobile while irrevocably locking in an oral declaration made in ignorance. The result is a great divergence in the application of the law which should be interpreted and applied uniformly.

This Court should establish national policy of uniform applicability which would make travellers by automobile subject to the same rights and responsibilities as travellers by air.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment should be reversed.

Respectfully submitted this 5th day of March, 1987.

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 84-4419

UNITED STATES OF AMERICA,
PLAINTIFF—APPELLEE,

v.

FORTY-SEVEN THOUSAND NINE HUNDRED EIGHTY DOLLARS ($47,980) IN CANADIAN CURRENCY,
DEFENDANT,

and

BSP INVESTMENT AND DEVELOPMENT, LTD.,
CLAIMANT—APPELLANT.

Filed November 19, 1986

Appeal from the United States District Court
for the District of Idaho

Before WALLACE and THOMPSON, Circuit Judges,
and STEPHENS, ** District Judge.
WALLACE, Circuit Judge:

BSP Investment and Development, Ltd. (BSP) appeals from a judgment of civil forfeiture in favor of the United States. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

** Honorable Albert Lee Stephens, Jr., United States District Judge, Central District of California, sitting by designation.

I

BSP is a Canadian corporation whose principal officers and shareholders are Stark and Pascoe. On February 22, 1979, Stark and Pascoe entered the United States by automobile, carrying with them $47,980 in Canadian currency, which belonged to BSP. Stark and Pascoe were routinely stopped at the United States Customs Port of Entry at Eastport, Idaho, and questioned regarding the purpose of their visit to the United States and what property they carried with them.

Inspection of their car produced a briefcase containing a large quantity of currency, packaged in envelopes. When the customs inspector asked Stark and Pascoe if they were carrying over $5,000, they lied to him, stating that they had only $4,000. When the customs inspector told Pascoe and Stark that he wished to count their currency, Stark and Pascoe produced three envelopes, containing a total of approximately $12,000. When the customs agent drew their attention to the reporting requirement for transportation of more than $5,000, Pascoe stated that he had not wished to be bothered with the disclosure forms, which he referred to as "I.R.S." forms. In view of the circumstances, however, Pascoe had a change of heart, and stated that he and Stark wished to declare the $12,000 they had produced. With further search, the customs inspector found additional envelopes of money, and was told that it amounted to approximately $20,000. Ultimately, $47,980 in Canadian currency was found in the briefcase by customs officers.

Customs authorities seized the currency because Stark and Pascoe had failed to declare to upon entry, as required by 31 U.S.C. § 1101, *recodified as* 31 U.S.C. § 5316. One day later, on February 23, 1979, the Customs Service sent Stark a "Notice of Seizure and Information for Claimants" offering three alternatives with respect to the seized currency. Stark was informed that if he did nothing the matter would be referred to the United States Attorney within 60 days for institution of judicial forfeiture proceedings. Stark could instead expressly request that the matter be immediately referred. Alternatively, he could file a petition for administrative relief. He was informed that by filing for administrative relief he would be requesting the Customs Service *not* to refer the matter to the United States Attorney for the institution of judicial forfeiture proceedings while the admini-

strative petition was pending. On April 20, 1979, BSP filed a petition for administrative relief. Ten days later the Customs Service advised BSP that administrative relief would not be considered until the United States Attorney decided whether to file criminal charges, because the currency might be used as evidence in a criminal trial. The criminal investigation ended when the Customs Service advised BSP on August 13, 1979, that no criminal prosecution would be pursued. Nearly four months later, on December 11, 1979, the Customs Service decided to deny remission of forfeiture and, on December 17, referred the matter to the United States Attorney for prosecution of a civil forfeiture action. Four months thereafter, on April 1, 1980, the United States Attorney filed this in rem forfeiture action.

The district court granted summary judgment for BSP on the ground of delay in the institution of the forfeiture proceeding which was commenced nearly 14 month after the currency was seized. On appeal, we initially affirmed this judgment, reasoning that the 14-month delay constituted a violation of constitutional due process. *United States v. Forty-Seven Thousand Nine Hundred Eighty Dollars ($47,980.00) in Canadian Currency*, 689 F. 2d 858, 860-61 (9th Cir. 1982) (*Canadian Currency I*). We granted rehearing after the Supreme Court decided *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 461 U.S. 555 (1983) (*$8,850*), to reconsider our holding in light of that decision. *United States v. Forty-Seven Thousand Nine Hundred Eighty Dollars ($47,980.00) in Canadian Currency*, 726 F. 2d 532 (9th Cir. 1984) (*Canadian Currency II*). In *$8,850* the Supreme Court applied the four-factor analysis of *Barker v. Wingo*, 407 U.S. 514 (1972) (*Barker*), to uphold an 18-month delay in the initiation of forfeiture proceedings. We withdrew our opinion *Canadian Currency I* and remanded to the district court to allow it to apply the *Barker* factors in this case. *Canadian Currency II*, 726 F.2d at 533-34.

The district court, applying *Barker* and *$8,850*, found no violation of due process with respect to delay in the initiation of forfeiture proceedings. It found further that the reporting statute was violated and that the currency was subject to forfeiture. BSP appeals, arguing that the district court misapplied the *Barker* factors. In addition, BSP argues that the district court erred by concluding that the forfeiture statute does not require notice of reporting requirements for forfeiture to lie.

II

We apply de novo review to determine whether a delay in the initiation of civil forfeiture provisions is unconstitutional. *United States v. One 1954 Rolls Royce Silver Dawn*, 777 F.2d 1358, 1361 (9th Cir. 1985).

Under *Barker*, four factors must be weighed to determine whether due process was denied. These are the length of delay, the reason for the delay, the defendant's assertion of its right to speedy determination, and prejudice. *See $8,850*, 461 U.S. at 564, *applying Barker*, 407 U.S. at 530 . This test is flexible, "balancing the interests of the claimant and the government to assess whether the basic due process requirement of fairness has been satisfied in a particular case," and none of the four factors represents "a necessary or sufficient condition for finding unreasonable delay." *$8,850*, 461 U.S. at 565.

A.

In *$8,850*, the total delay was 18 months. Here, the delay is 14 months, a period that may be significant. *See United States v. $23,407.69 in U.S. Currency*, 715 F.2d 162, 165 (5th Cir. 1983) (13 months). However, here, as in *$8,850*, the delay was justified by important concerns related to the administration and enforcement of law.

B.

As pointed out in *$8,850*, the possibility of a criminal proceeding justifies delay in instituting a civil forfeiture suit. *$8,850*, 461 U.S. at 567. A criminal conviction may result in forfeiture, rendering civil proceedings unnecessary. *Id.* at 567-68. Moreover, a prior civil suit "might serve to estop later criminal proceedings and may provide improper opportunities for the claimant to discover the details of a contemplated or pending criminal prosecution." *Id.* at 567. A thorough criminal investigation may be very time consuming. We have no indication that the criminal investigation in this case, which terminated six months after the currency was seized, was unreasonably lengthy. BSP, Stark, and Pascoe can hardly complain that it terminated in a decision *not* to seek criminal indictments. If the government were forced to initiate criminal proceedings without adequate investigation it might have made a premature decision to prosecute, at considerable cost to Stark, Pascoe, and BSP.

There is a similar interest in avoiding unnecessary judicial proceedings for civil forfeiture by allowing the Secretary time to decide whether or not to grant administrative relief on a petition for remission. *Id.* at 566-67. Remission or mitigation may obviate the necessity for judicial forfeiture proceedings, and avoids the burden of dual proceedings in different forums. *Id.* at 566. Moreover, claimants might lose the benefit of discretionary administrative relief if the government "were forced to initiate judicial proceedings without regard to administrative proceedings." *Id.* "Such an investigation inherently is time consuming," and here, as in *$8,850*, "there is no indication that it was not pursued with diligence." *Id.* at 567-68.

In *$8,850*, the administrative investigation consumed an initial seven months, and criminal indictments were obtained within two months thereafter. *Id.* In this case, the criminal investigation took an initial six months, and ended in a determination favorable to Stark and Pascoe. *See Canadian Currency I*, 689 F.2d at 860. The Customs Service took an additional four months to determine that remission should be denied as a matter of discretion. This is similar to the situation in *$8,850* where, after a five-month criminal trial ended in a determination favorable to the claimant, three months passed before the Secretary determined that civil forfeiture should be pursued. Given these facts, we cannot conclude that the 14-month delay in this case was substantially unjustified.

C.

The third element demands consideration of the claimant's "assertion of the right to a judicial hearing." *Id.* at 568. Here, as in *$8,850*, the claimant requested administrative relief, knowing that civil proceedings before a court would thereby be delayed. The failure to request immediate judicial proceedings suggests that an early judicial hearing was not desired. *Id.* at 569.

D.

Finally, there is no indication that BSP was prejudiced by the delay in this case. As with the claimant in *$8,850*, BSP "has never alleged or shown that the delay affected [its] ability to defend against the impropriety of the forfeiture on the merits." *Id.* at 569.

Considering the balance of factors in this case, we agree with

the district court that the delay encountered here was reasonable and did not abridge the fundamental fairness guaranteed by due process of law.

III

BSP argues that the district court misconstrued the governing statute. Statutory construction is a question of law subject to de novo review. *United States v. McConney*, 728 F. 2d 1195, 1201 (9th Cir.)(en banc), *cert. denied*, 469 U.S. 824 (1984). BSP contends that forfeiture requires a willful refusal to declare currency, undertaken with knowledge of the legal reporting requirements.

A.

Section 1101 requires any person who "knowingly transports . . . monetary instruments of more than $5,000 at one time . . . to a place in the United States from or through a place outside the United States" to file a report regarding the amount and kind of instruments so transported, ownership, and other information. *See* 31 U.S.C. § 5316. The statutory language thus suggests that a person is subject to the reporting requirements if he *knows* he is transporting more than $5,000, regardless of knowledge of the reporting statute.

Congress imposed criminal penalities for violations of section 1101, providing that any person "willfully violating" its reporting provisions shall be subject to a fine and possible imprisonment. 31 U.S.C. § 1058, *recodified as* 31 U.S.C. § 5322; *see, e.g., Ivers v. United States*, 581 F. 2d 1362, 1366-67 (9th Cir. 1978). By imposing criminal penalities on "willful" violations alone, Congress's choice of words suggests that it recognized violations of section 1101 may be either willful or nonwillful — that is, with or without knowledge that the failure to report is illegal. The requirement of willfulness for a criminal violation thus "took this regulatory statute out of the ranks of strict liability type crimes." *United States v. Granda*, 565 F. 2d 922, 926 (5th Cir. 1978); *see United States v. Chen*, 605 F.2d 433, 434 (9th Cir. 1979).

In the civil forfeiture provision, by contrast, Congress did not include any scienter requirement. The statute provides simply that: "A monetary instrument being transported may be seized and forfeited to the United States Government when a report on

the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement." 31 U.S.C. § 5317(b). This language does not suggest that failure to file a report must be done with the knowledge that the report is required by law. Moreover, it is consistent with the general rule that under forfeiture enactments "the innocence of the owner of the property subject to forfeiture has almost uniformly been rejected as a defense." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974). As we held before in this case, "the statute and regulations clearly impose a duty to report at least by the time of inspection, and *a failure to report at that time completes the violation.*" *Canadian Currency II*, 726 F. 2d at 534 (emphasis added).

Consistent with this position, several courts have held that knowledge of reporting requirements is not required for civil forfeiture. *United States v. $831,160.45 United States Currency*, 607 F. Supp. 1407, 1414 (N.D. Cal. 1985), *aff'd*, 785 F. 2d 317 (9th Cir. 1986); *United States v. United States Currency Amounting To the Sum Of Five Thousand, Three Hundred and Ninety-Three Dollars ($5,393.00)*, 583 F. Supp. 1447, 1449 (E.D.N.Y. 1984); *United States v. Four Million Two Hundred Fifty Five Thousand Six Hundred and Twenty-Five Dollars and Thirty-Nine Cents ($4,255,625.39)*, 528 F. Supp. 969, 971-72 (S.D. Fla. 1981). "The forfeiture provisions here are straightforward," *United States v. Six Thousand Seven Hundred Dollars ($6,700) In United States Currency*, 615 F. 2d 1, 3 (1st Cir. 1980), and require no showing of criminal intent. *Cf. id.* ("forfeiture is not tied to or dependent upon the wrongdoing of the owner of the monetary instruments").

The Eleventh Circuit, in *United States v. One (1) Lot Of Twenty-Four Thousand Nine Hundred Dollars ($24,900.00) in U.S. Currency*, 770 F.2d 1530 (11th Cir. 1985), however, has interpreted the "knowingly transports" language of section 1101 to mean that for purposes of civil forfeiture the failure to report must be committed with knowledge of the reporting requirement and an intent to break the law. We have already rejected the Eleventh Circuit's interpretation. In *United States v. One Hundred Twenty-Two Thousand Forty-Three Dollars ($122,043.00) In United States Currency*, 792 F.2d 1470 (9th Cir. 1986), we held that the government need not prove knowledge of the reporting

requirement as an element of its civil forfeiture case. *Id.* at 1473-74. That case controls our disposition of this appeal. As we stated:

> The plain language of the statutory provisions, 31 U.S.C. §§ 5316-5317,does not include knowledge of the reporting requirement as an element for forfeiture. The only knowledge requirement is that the person know that he or she is transporting more than $5,000 out of the country.

Id. at 1474 (footnote omitted).

B.

We find no merit in BSP's contention that a violation of the reporting requirement was never completed because Stark and Pascoe were denied the opportunity to file a declaration once the legal requirement was drawn to their attention. When the customs agent informed them of the reporting requirement, Pascoe complained that he had not wished to be bothered with disclosure forms—which he referred to as "I.R.S." forms. When finally he did express a desire to file a report, Pascoe stated an intention to report $12,000 — only a fraction of the sum that Stark and Pascoe had transported over the border.

These facts do not suggest that Stark and Pascoe sought to declare the currency at an appropriate time, or that they were denied the oppportunity to do so.

AFFIRMED.

STEPHENS, District Judge dissenting:

As the forfeiture statute, 31 U.S.C. Section 1101 (recodified as 31 U.S.C. Section 5316) has evolved through judicial interpretation, one bite at a time, it has lost almost all semblance of fairness, as fairness is viewed by the ordinary citizen. I invite attention to Judge Beezer's dissent and especially footnote 9 in *United States v. One Hundred Twenty-Two Thousand Forty-Three Dollars ($122,043.00) In United States Currency*, 792 F. 2d 1470 (9th Cir. 1986). Judge Beezer's concern arises out of a requirement to report currency when leaving the United States while our Canadian Currency case involves entry into the United States, but both cases involve situations where the person transporting the currency may not be aware of the requirement to report the currency. The Secretary could avoid one major element

of unfairness by requiring that all persons entering or leaving the United States be given a written explanation of the reporting requirements before any questions are asked concerning transportation of currency.

However, I am still concerned with this particular case as well as the effect of this decision upon future cases. In my opinion it would not be inappropriate for the Secretary to reconsider the defendant's petition for clemency and any further explanation which the petitioning party might offer.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civ. No. 80-1083

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

FORTY-SEVEN THOUSAND NINE HUNDRED EIGHTY DOLLARS ($47,980) IN CANADIAN CURRENCY,
DEFENDANT.

[Filed October 16,1984]

MEMORANDUM OF DECISION

The Court's original decision in this case was based on the law of the Ninth Circuit as enunciated in *United States v. Eight Hundred Fifty Dollars*, 645 F. 2d 836 (9th Cir., 1981). (Referred to herein as *$8,850.*) This Court granted summary judgment against the United States, which decision was affirmed on appeal. 689 F. 2d 858 (9th Cir., 1982).

The Supreme Court of the United States subsequently granted certioarari in *$8,850* and issued a decision on May 23, 1982, totally eroding the grounds for this Court's original decision and the Ninth Circuit's affirmation of the same. *$8,850*, 455 U.S. 1015, 103 S.Ct. 2005, 76 L.Ed. 143. The Ninth Circuit has since withdrawn its original decision, vacated this Court's ruling of summary judgment against the government and remanded the case to this Court. In its decision, the Court set forth the issue to be decided as that of due process.

In *$8,850*, the Supreme Court held that the proper test in determining whether delay in initiating judicial forfeiture proceedings violates due process is supplied by *Barker v. Wings*, (sic) 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972). *Barker* requires the weighing of four factors: The length of the delay; the reason for the delay; the claimant's assertion of his right; and the prejudice to the claimant. *Id.* The Ninth Circuit believed it inappropriate to apply the *Barker* test in their forum and remanded the case stating that the actual "weighing and assessment" should

initially be done by the district court. While the circuit court did not decide the issue, they did mention that a reasonable argument could be made "that the delay in *$8,850* was more excessive under the circumstances than the delay in this case". 726 F. 2d 532 (9th Cir., 1984). The case, therefore, has been remanded so this Court can undertake the analysis required by the Supreme Court's decision in *$8,850, id.*.

On August 21, 1984, this cause came on regularly for court trial. Four witnesses were sworn and testified as to the circumstances surrounding the failure to report currency in excess of $5,000 as required by 31 U.S.C. 5316. In applying the *Barker* test, this court makes the following findings of fact and conclusions of law. The length of the delay in instituting judicial forfeiture proceedings was approximately 14 months. While this delay is "quite significant" in itself, it does not violate due process. *$8,850, id.*. The reason for the government's delay was the pendency of a petition for administrative remission and the pendency of a criminal investigation. The delay was reasonable since the claimant petitioned for administrative remission after being advised that such a petition constituted a request that judicial proceedings be delayed. The claimant did not assert its right since no request for judicial proceedings was made.

At trial, the claimant asserted prejudice, lack of knowledge of the reporting requirement and lack of opportunity to report. The claimant was totally unable to establish that the delay in judicial proceedings prejudiced it in any way. The assertions of lack of knowledge and opportunity to report on the part of the witnesses for claimant are equally without merit. The facts establish that the request for a report form came after the agents of the claimant had stated that they were carrying only $4,000. They were discovered to be carrying $12,000 when the request was made. Claimant's witnesses' testimony to the contrary was not credible.

The law of this case is clear that the violation was complete when the agents of the claimant failed to report by the time of inspection. Claimant's agents were found to be carrying $12,000 and they still did not report the balance of the money they were carrying. The Court of Appeals stated:

> In our view, the statute and regulations clearly impose a duty to report at least by the time of inspection, and a failure to report at that time completes the violation. Any other con-

struction would render enforcement difficult and would frustrate the congressional intent underlying the reporting requirement as well as the intent behind the statute authorizing forfeiture of monetary instruments "being transported" in violation of the reporting requirement. 31 U.S.C. 1101(b), now 31 U.S.C. 5317 (a).

Judgement must therefore be entered for the United States and against the claimant.

Accordingly, counsel for plaintiff shall prepare proposed findings of fact and conclusions of law and judgment, serve copies of the same on counsel for claimant, and submit the originals to the Court.

Dated this 16th day of October, 1984

/s/ Fred M. Taylor
Fred M. Taylor
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-3415

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,

v.

FORTY-SEVEN THOUSAND NINE HUNDRED EIGHTY DOLLARS ($47,980.00) IN CANADIAN CURRENCY,
DEFENDANT-APPELLEE.

[Filed February 22, 1984]

Appeal from the United States District Court
for the District of Idaho

Before: FARRIS and CANBY, Circuit Judges,
and CURTIS*, District Judge.

CANBY, Circuit Judge:

Our previous decision in this civil forfeiture action is reported at 689 F. 2d 858, where the facts are fully set forth. There we affirmed a summary judgment against the government. We held that excessive delay by the government in instituting judicial forfeiture proceedings violated due process. In so holding, we relied substantially, as had the district court, on *United States v. Eight Thousand Eight Hundred Fifty Dollars*, 645 F. 2d 836 (9th Cir. 1981) ("*$8,850*"). Because the Supreme Court had granted certiorari in *$8,850*, we extended the time for the government to petition for rehearing of this appeal until the Supreme Court had decided *$8,850*.

On May 23, 1983, the Supreme Court entered its decision in *$8,850*, ____ U.S. ____, 103 S.Ct. 2005. The government subsequently filed its petition for rehearing in this case and claimant filed a response to that petition. On the strength of the Supreme Court's decision in *$8,850*, we now grant the petition for rehear-

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* The Honorable Jesse W. Curtis, United States District Judge for the Central District of California, sitting by designation.

ing, withdraw our previous decision, and reverse the summary judgement against the government. In reversing, we also reject two other grounds which were originally urged by claimant in support of the district court's judgment but which were not dealt with in our previous decision.

In *$8,850*, the Supreme Court held that *Barker v. Wingo*, 407 U.S. 514 (1972), supplied the appropriate test for determining whether delay in initiating judicial forfeiture proceedings violated due process. 103 S.Ct. at 2012. *Barker* requires a weighing of four factors: the length of delay, the reason for the delay, the claimant's assertion of his right, and prejudice to the claimant. *Id.* Applying these factors in *$8,850*, the Supreme Court held that an 18-month delay, "quite significant" in itself, did not violate due process. *Id.* The Court found to be weighty two reasons for delay: the initiation and determination of a petition for administrative remission, and the subsequent pendency of criminal proceedings. The Court was impressed with the district court's assessment that the government had proceeded with "all due speed." *Id.* 2014. The Court also relied on the fact that the claimant had never requested the institution of judicial proceedings, although she had requested a speedy determination of her petition for administrative remission. Finally, the Court noted that there was no showing of prejudice to the claimant in that she had not shown that "the delay affected her ability to defend the propriety of the forfeiture on the merits." *Id.*

In the present case the delay in instituting judicial forfeiture proceedings was approximately 14 months. The government's reasons for the major part of this delay were the pendency of a petition for administrative remission and the pendency of a criminal investigation. Claimant did not request the institution of judicial forfeiture proceedings and, indeed, petitioned for administrative remission after being advised that such a petition constituted a request that judicial proceedings be delayed. We originally held that neither the pendency of the administrative and criminal proceedings nor the behavior of the claimant justified the delay in initiating the forfeiture action. We also held that no showing of prejudice to the claimant was needed to establish a due process violation based on excessive delay 689 F.2d at 860-61.

Without question, the decision of the Supreme Court in *$8,850* totally erodes the foundations of our previous decision and re-

quires that we withdraw it. Indeed, a reasonable argument can be made that the delay in *$8,850* was more excessive under the circumstances than the delay in this case, and that *$8,850* compels us to direct a judgment for the government on that issue. We think it inappropriate, however, to apply the *Barker v. Wingo* test in the first instance in this court. The Supreme Court in *$8,850* relied in part on the district court's determination of the government's diligence in attempting to move the administrative and criminal proceedings along. 103 S.Ct. at 2014. The Court also made it clear that the pendency of administrative or criminal proceedings did not automatically toll the time for instituting forfeiture actions, but was simply a factor to be weighed, like the other *Barker v. Wingo* factors, in assessing the reasonableness of the delay. Such weighing and assessment should initially be done by the district court. The district court in the present case engaged in no *Barker v. Wingo* analysis, of course, because our decision in *$8,850* was the law of the circuit and had not yet been reversed by the Supreme Court. We now vacate the district court's judgment and remand so that the district court can undertake the analysis required by the Supreme Court's decision in *$8,850*. The district court may then conduct any further appropriate proceedings following from its determination.

Our conclusion that the district court's ruling on excessive delay can no longer stand requires us to address for the first time two additional issues. The district court supported its summary judgment against the government on two, further grounds, which the claimant initially urged on appeal in support of the judgment. Our previous disposition made it unnecessary to deal with those grounds, but we now must reach them.

The first ground was that, because claimant's agents were denied entry into the United States at the border station, they never became subject to the requirement of 31 U.S.C. § 1101, now 31 U.S.C. § 5316, that they report currency in excess of $5,000. Section 1101 (b) provided that the report had to be filed at the time and place the Secretary of the Treasury prescribed, and the applicable regulation required the report to be filed "at the time of entry into the United States." 31 C.F.R. § 103.25 (1982). Similarly, § 1101 (a) (1) (B) applied the reporting requirement to one transporting money "to a place in the United States from or through a place outside the United States."

We think it is too narrow a construction of these provisions to hold, as the district court did, that they do not impose a reporting requirement on persons who present themselves at a port of entry, on United States soil, for the purposes of inspection and approval of entry into the United States. In our view, the statute and regulations clearly impose a duty to report at least by the time of inspection, and a failure to report at that time completes the violation. Any other construction would render enforcement difficult and would frustrate the congressional intent underlying the reporting requirement as well as the intent behind the statute authorizing forfeiture of monetary instruments "being transported" in violation of the reporting requirement. 31 U.S.C. § 1101 (b), now 31 U.S.C. § 5317 (a).

We find *United States v. Oscar*, 496 F.2d 492 (9th Cir. 1974), to be distinguishable. In that case the crime was *obtaining entry* into the United States by false representations and we held that the crime was not committed when the would-be entrants were stopped by customs officers and were never freed of their official restraint or granted official entry. In the present case, however, the violation is the failure to report in itself, and the failure was complete at the port of entry. It would make the reporting requirements wholly nonsensical if the reasoning of *Oscar* were applied so as to require immigration officers to afford entry and release to persons crossing the border before a reporting requirement could even be said to arise. We therefore reject this ground of support for the district court's summary judgment.

The final ground upon which the district court based its judgment was that the agents for the claimant were never given an opportunity at the port of entry to prepare and file the requisite form, even after they requested it. The facts presented by the government, however, indicate that the request for a report form came after the agents of the claimant had stated that they were carrying only $4,000 but had been discovered to be carrying $12,000. The government also showed that one of the claimant's agents said that he had not reported the currency in accordance with posted notices because he thought the information was required for the I.R.S. and he did not want to be bothered with an I.R.S. form. Whatever the facts ultimately are determined to be, this showing by the government is sufficient to forestall a summary judgment based on either lack of opportunity to report

or lack of knowledge of the reporting requirement. The summary judgment therefore cannot be sustained on this ground.

The summary judgment entered by the district court is vacated and the case is remanded to the district court for further proceedings in accordance with this opinion.

REHEARING GRANTED;
PRIOR DECISION WITHDRAWN,
JUDGMENT OF THE DISTRICT COURT VACATED;
CASE REMANDED.

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 81-3415

UNITED STATES OF AMERICA,
PLAINTIFF—APPELLANT,

v.

FORTY-SEVEN THOUSAND NINE HUNDRED EIGHTY DOLLARS ($47,980.00) IN CANADIAN CURRENCY,
DEFENDANT—APPELLEE.

[Filed October 6, 1982]

Appeal from the United States District Court
for the District of Idaho

Before: FARRIS and CANBY, Circuit Judges,
and CURTIS*, District Judge.

CANBY, Circuit Judge:

On April 2, 1980, the government instituted this in rem action seeking forfeiture, under the provisions of 31 U.S.C. §§ 1101 and 1102, of $47,980 in Canadian currency seized by Customs. The Government appeals from the district court's order granting summary judgment to claimant, BSP Investment & Development, Ltd. (BSP), and ordering the government to return the currency. The district court decided, *inter alia*, that the 14-month post-seizure delay in the institution of these forfeiture proceedings was unjustified and that the delay denied claimant its fifth amendment right to a prompt post-seizure judicial hearing. We affirm.

Customs summarily seized the currency on February 22, 1979, from William A. Stark and Robert J. Pasco, two officers of claimant. Stark and Pasco had allegedly failed to declare the currency during an attempted entry into the United States from Canada. On February 23, Customs sent Stark a form entitled "Notice of

* The Honorable Jesse W. Curtis, United States District Judge, for the Central District of California, sitting by designation.

Seizure and Information for Claimants" giving him three alternatives. If Stark did nothing, the matter would be referred to the United States Attorney within 60 days. If he did not file a petition for relief, he could expressly request that the matter be referred immediately. His third choice was to file a petition for administrative relief. The form expressly provided, however, that if he chose to file for administrative relief he would be "requesting the Customs Service *not* to refer the matter to the United States Attorney for the institution of judicial forfeiture proceedings while the administrative petition was pending."

On April 20, 1979, BSP began its attempts to regain possession of the currency, filing a petition for administrative relief with the District Director of Customs. Ten days later, Customs advised BSP that no administrative action could be considered until the United States Attorney determined whether to file criminal charges because the money would be used as evidence in a criminal trial. The criminal investigation continued until August 13, 1979, six months after seizure, when the Customs office advised BSP's attorney that criminal prosecution had been declined and that administrative review would begin. Meanwhile on July 12, a Customs District Director urged his superiors to deny the petition for administrative relief and to initiate forfeiture proceedings, but Customs did not act at that time. On November 14, an attorney for Stark and Pasco wrote to express his concern that although criminal prosecution had been declined three months earlier, the money had not yet been returned. On December 11, almost ten months after Customs had seized the currency and four months after criminal prosecution had been declined, Customs decided to deny remission of the forfeiture. Customs referred the matter to the United States Attorney on December 17, 1979.

Four more months passed. Finally, on April 2, 1980, the United States Attorney filed this in rem forfeiture action. The action was brought almost 14 months after seizure of the money, eight months after criminal prosecution had been declined, and four months after Customs had referred the matter to the Attorney General for institution of civil forfeiture proceedings. On August 20, 1980, claimant filed an answer and moved to dismiss the action on the grounds of delay in the institution of the proceedings. The motion was denied, but claimant's subsequent motion for sum-

mary judgment was granted on June 23, 1981.

Forfeiture actions must be brought promptly, since Customs seizures infringe on the owner's right to possess and enjoy property. *United States v. Eight Thousand Eight Hundred Fifty Dollars*, 645 F.2d 836 (9th Cir. 1981), *cert. granted*, ____U.S. ____ , 102 S. Ct. 1708 (March 22, 1982); *United States v. 295 Ivory Carvings*, No. 81-3260 (9th Cir. _____ , 1982), *Ivers v. United States*, 581 F. 2d 1362, 1368 (9th Cir. 1978). Congress has recognized this concern in the provisions of 19 U.S.C. §§ 1602-1604 by requiring prompt action subsequent to seizure.

The government's 14-month delay in the institution of this forfeiture action was both unreasonable and unjustified. The record does not support the government's contention that claimant concurred in this delay. The government acknowledges that the pendency of an administrative relief petition would not ordinarily justify a 14-month delay. *See 295 Ivory Carvings, supra; Eight Thousand, supra; Ivers, supra*. The government argues that because the claimant in this case filed the administrative relief petition after having been notified that the petition would be treated as a request for a delay, the claimant concurred in the delay necessary for resolution of the administrative claim. *See Ivers, supra*. We need not decide this question, because even if BSP had initially concurred in a delay, that concurrence was not for an indefinite period of time. Due process requires the government to act promptly in ruling on petitions for remission or mitigation, *cf. Von Neumann v. United States*, 660 F.2d 1319, 1326 (9th Cir. 1981) (holding that promptness is required in ruling on petitions brought under 19 U.S.C. § 1618), and the government has not demonstrated that the administrative relief procedure should have taken ten months. After six months were spent investigating the possibility of bringing criminal charges, four more months elapsed before administrative relief was denied and the matter was referred to the United States Attorney. This delay violated 19 U.S.C. § 1603. Finally, four *more* months passed before the civil forfeiture proceeding was instituted, violating 19 U.S.C. § 1604. In summary, it took the government 14 months after seizure and eight months after criminal charges were declined to decide to prove its right to retain claimant's property. This delay was unreasonable and unjustified, and the record does not support the government's contention that claimant concurred.

Nor do we accept the argument that the claimant's delay in answering the government's complaint establishes its concurrence in the delay in initiating the action. Claimant evidently encountered difficulty in finding United States counsel, understanding United States forfeiture law, and overcoming practical difficulties involved in Stark and Pasco's participating in litigation in Idaho after having been refused admission to the United States. Under these circumstances, claimant's difficulties in responding to a forfeiture action cannot be interpreted as concurrence in the 14-month delay in initiating those proceedings.

The government's argument that claimant must show prejudice as an element of its due process claim is rejected for reasons fully set forth in our opinion in *United States v. 295 Ivory Carvings, supra*, decided this same day. That opinion also sufficiently disposes of the government's contention that dismissal is an inappropriate sanction for violation of claimant's constitutional right to a prompt post-seizure hearing.

Our disposition of this case makes it unnecessary for us to reach the other grounds offered by the district court in support of its decision, and we express no opinion on them.

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civ. No. 80-1083

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

FORTY-SEVEN THOUSAND NINE HUNDRED EIGHTY DOLLARS ($47,980) IN CANADIAN CURRENCY,
DEFENDANT.

[Filed July 14, 1981]

ORDER

The United States brought this action to compel a forfeiture of $47,980.00 in Canadian currency because of alleged violations of the currency reporting requirements found in 31 U.S.C. § 1101. The owner of the currency answered and later moved for summary judgment which was granted by the court. The United States now requests a stay of the judgment pending appeal.

In granting the summary judgment, the court considered several factors. First, the record discloses that the persons carrying the currency were never given an opportunity to prepare and file the requisite form, even after they requested such a form. Second, it appears that before the full amount of the currency was ever ascertained, the carriers were informed that they were not going to be allowed to enter the United States. Thus, in the circumstances, it is doubtful that any duty to report ever arose. Third, the court determined that the fourteen-month delay in instituting the present forfeiture action was an unnecessary and unreasonable delay under the standard recently ennunciated by the Ninth Circuit Court of Appeals in *U.S. v. Eight Thousand Eight Hundred Fifty Dollars ($8,850.00) In U.S. Currency*, 645 F. 2d 836 (9th Cir. 1981).

Since the court believes that any one of the above grounds could independently have supported summary judgment for the owners of the currency, it would be unreasonable and unjust to assist the United States in any further delay in returning the cur-

rency to its true owners.

Accordingly, IT IS ORDERED that the motion of the United States for Stay Pending Appeal be, and the same hereby is, DENIED.

Dated this 14th day of July, 1981.

/s/ Fred M. Taylor

FRED M. TAYLOR
United States District Judge

APPENDIX F

The Currency and Foreign Transactions Reporting Act provides in pertinent part as follows (31 U.S.C. §§ 5316,and 5317):

§ 5316.

(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—

(1) transports or has transported monetary instruments of more than $5,000 at one time—

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through a place outside the United States; or

(2) receives monetary instruments of more than $5,000 at one time transported into the United States from or through a place outside the United States.

(b) A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. The report shall contain the following information to the extent the Secretary prescribes:

(1) the legal capacity in which the person filing the report is acting.

(2) the origin, destination, and route of the monetary instruments.

(3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both.

(4) the amount and kind of monetary instruments transported.

(5) additional information.

(c) This section or a regulation under this section does not apply to a common carrier of passengers when a passenger possesses a monetary instrument, or to a common carrier of goods if the shipper does not declare the instrument.

§ 5317

(a) The Secretary of the Treasury may apply to a court of competent jurisdiction for a search warrant when the Secretary reasonably believes a monetary instrument is being transported and a report on the instrument under section 5316 of this title [31 USCS § 5316] has not been filed or contains a material omission or misstatement. The Secretary shall include a statement of information in support of the warrant. On a showing of probable cause, the court may issue a search warrant for a designated person or a designated or described place or physical object. This subsection does not affect the authority of the Secretary under another law.

(b) A monetary instrument being transported may be seized and forfeited to the United States Government when a report on the instrument under section 5316 of this title [31 USCS § 5316] has not been filed or contains a material omission or misstatement. A monetary instrument transported by mail or a common carrier, messenger, or bailee is being transported under this subsection from the time the instrument is delivered to the United States Postal Service, common carrier, messenger, or bailee through the time it is delivered to the addressee, intended recipient, or agent of the addressee or intended recipient without being transported further in, or taken out of, the United States.

No. 86-1468

In the Supreme Court of the United States

OCTOBER TERM, 1986

BSP INVESTMENT AND DEVELOPMENT, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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TABLE OF AUTHORITIES

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in holding it subject to civil forfeiture under 31 U.S.C. 5316 and 5317, despite the fact that its principals purportedly lacked knowledge of the applicable currency reporting requirements. Petitioner also asserts that its rights under the Equal Protection Clause were violated because, unlike persons who enter the United States by air, entering motorists are not furnished with reporting information and declaration forms.

1. Petitioner is a Canadian corporation. On February 22, 1979, Stark and Pascoe, principal officers of petitioner, entered the United States from Canada by car. They were stopped by United States Customs Service agents at the Port of Entry in Eastport, Idaho, for a routine inspection. While examining their car, a customs inspector observed several sealed envelopes and asked Stark and Pascoe

whether they were carrying more than $5,000 in currency. The men falsely stated that they were carrying only about $4,000. Pet. App. 2a.

The inspector advised Stark and Pascoe that he wanted to verify the amount of currency in their possession. The two men then produced three envelopes containing $12,000. The inspector apprised Stark and Pascoe that they were required to report currency in excess of $5,000.[1] Pascoe said that he had not wanted to be bothered with disclosure forms, which he referred to as "IRS" forms. Pascoe then stated that he and Stark wished to declare the $12,000. Pet. App. 2a.

The inspector continued his examination and discovered some additional envelopes. Inside, the inspector found more currency. In all, the inspector found a total of $47,980 in Canadian currency and seized it. Pet. App. 2a.

The following day, the government issued a Notice of Seizure to petitioner. On April 20, 1979, petitioner filed a petition for administrative relief with the Customs Service. Customs notified petitioner that it would not act on the petition until the United States Attorney decided whether or not to file criminal charges. On August 13, 1979, Customs informed petitioner that no criminal charges would be filed. Thereafter, on December 13, 1979, Customs denied remission of the forfeiture and referred the case to the United States Attorney to commence a civil forfeiture action. Pet. App. 2a-3a.

On April 2, 1980, the government instituted its civil forfeiture action against petitioner (Pet. App. 18a). The district court initially granted summary judgment for petitioner

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[1]As amended in October 1984, Section 5316 now requires a report when persons transport in excess of $10,000. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 901(c), 98 Stat. 2135.

because of the delay in commencing the proceedings. The court of appeals affirmed (Pet. App. 18a-21a), but on rehearing (Pet. App. 13a-17a) it reinstated the action and remanded the case for trial. Following trial, the district court entered judgment for the United States (Pet. App. 10a-12a). It rejected as "without merit" petitioner's contention that Stark and Pascoe lacked knowledge of the currency reporting requirements and found "not credible" the testimony of petitioner's witnesses. Pet. App. 11a. The court also concluded that the 14-month hiatus between the seizure of the currency and the institution of forfeiture proceedings did not violate due process. *Ibid.*

2. The court of appeals affirmed by a divided vote (Pet. App. 1a-9a). The court agreed that petitioner's due process rights had not been violated by the delay in commencing the forfeiture action. Pet. App. 4a-6a. The court also held (*id.* at 6a-8a) that a person may be subject to civil forfeiture under 31 U.S.C. 5316 and 5317 even if he lacks knowledge of the currency reporting requirements. In any event, the court noted (Pet. App. 8a), Stark and Pascoe had been given an opportunity to report the correct amount of their currency but instead had lied about the amount that they had to declare.[2]

3. Noting a conflict between the decision in this case and that of the Eleventh Circuit in *United States* v. *One (1) Lot of $24,900.00 in U.S. Currency*, 770 F.2d 1530 (1985), petitioner asks (Pet. 7-11) the Court to resolve the question whether a traveler's knowledge of the currency reporting requirements is an element in a civil forfeiture action under 31 U.S.C. 5316 and 5317. This case is not an appropriate vehicle in which to resolve that conflict. As the district court

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[2]District Judge Stephens dissented (Pet. App. 8a-9a). He concluded that it is unfair to seek civil forfeiture without having first notified persons in writing of the applicable reporting requirements.

found (Pet. App. 11a)—and as the court of appeals confirmed (Pet. App. 8a)—petitioner's principals knew of the currency reporting requirements but simply chose to lie to the inspector about how much currency they were transporting. Pascoe made clear that he did not wish to be bothered with a reporting form, characterizing it as an "IRS" form. Thus, the decision in this case would have been the same whether or not knowledge is an element of a civil forfeiture proceeding under Sections 5316 and 5317.

In any event, the court of appeals correctly concluded that knowledge is not required under the civil forfeiture provisions. Section 5316, as presently amended, requires travelers to "file a report * * * when the person * * * knowingly * * * transports * * * more than $10,000." Section 5317 authorizes the seizure of currency when a report has not been filed. Neither section, by its terms, requires the government to prove that the person subject to seizure had knowledge of the applicable reporting requirements. Indeed, it is settled that the government may establish a civil forfeiture merely by showing that the property was brought into the country without the required declaration; it need not prove intent. See *United States* v. *Von Neumann*, No. 84-1144 (Jan. 14, 1986), slip op. 7 (quoting *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 234 (1972)).

4. Petitioner also contends (Pet. 11-15) that the Customs Service issues written notice forms of the currency reporting requirement to air travelers, but for travelers by car it only posts such information at border checkpoints. Petitioner asserts that that difference in treatment violates the Equal Protection Clause. This claim is meritless. First, petitioner did not raise this constitutional claim in the courts below and thus may not raise it here. See, *e.g.*, *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328-329 (1945) (per curiam); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935).

Moreover, because petitioner did not raise the claim below, there are no findings in the record to support petitioner's assertion that the Customs Service in fact maintains materially different reporting practices for air travelers and motorists. In any event, petitioner does not explain why these purported differences in treatment do not "rationally advance[] [the] reasonable and identifiable governmental objective" (*Schweiker* v. *Wilson*, 450 U.S. 221, 235 (1981)) of securing currency reports while at the same time accommodating the logistical differences between air and motor vehicle travel.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1987

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[3] *United States* v. *San Juan*, 545 F.2d 314 (2d Cir. 1976), is not germane. The court of appeals in that case reversed defendant's conviction because the jury was permitted to convict on a theory that the government did not rely on at trial. The *San Juan* case did not involve any issue of disparate treatment of air travelers and motorists.

No. 86-1468

In the Supreme Court of the United States

October Term, 1986

BSP INVESTMENT and DEVELOPMENT, LTD.
PETITIONER

v.

UNITED STATES OF AMERICA

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1. Issue of Disparate Treatment in Violation of Equal Protection Was Timely Raised.

The Memorandum of the United States in Opposition argues that petitioner failed in the courts below to raise the constitutional question of disparate treatment as a violation of the Equal Protection clause and that there are no facts in the record to support this claim.

This argument is totally in error. The issue of the disparate treatment by the United States Customs Service between travellers arriving by airplane and those arriving by automobile was raised in the first brief of petitioner in support of its motion for summary judgment at the District Court level submitted June 12, 1981. Pre-Trial Memorandum of Claimant, pp. 9-10.

The disparate treatment argument was reiterated by claimant in its brief submitted August 10, 1984 to Honorable Fred M. Taylor, District Judge, before trial after remand. Pre-Trial Memorandum of Claimant, pp. 14-15.

At the trial claimant offered in evidence U.S. Customs Declaration Form 6059D which is routinely given to every arriving airline passenger. Exhibit No. 130, RT., p. 31, L. 5-13. A considerable colloquy then occurred between Court and counsel in which Judge Taylor stated that he thought the opinion of the Ninth Circuit Court of Appeals on remand precluded a defense based upon the difference between treatment accorded ground travellers and air travellers. RT., p. 32, L. 23-25; p. 33, L. 1-25; p. 34,L. 1-18.

Form 6059D was admitted into evidence. RT., p. 37, L. 7-10. The trial record clearly established that Inspector Walter L. Wilson, acting pursuant to instructions, never offered Form 6059D or any other declaration form to Robert J. Pascoe or William A. Stark because travellers entering by automobile are treated differently. RT., p. 31, L. 11-21; p. 32, L. 1-16.

The factual record is fully established. Judge Taylor decided the case on other grounds so he had no reason to make any factual findings in disparate treatment. The evidence in the record as to differing treatment is undisputed.

The issue of disparate treatment was raised again upon the second appeal to the Ninth Circuit in claimant's opening brief under the specific heading "Automobile Entrant Given No Form". Opening Brief of Appellant, pp. 25-26. The final brief twice

noted that all air travellers are given Form 6059D while automobile entrants are given nothing. Reply Brief of Appellant, pp. 6 and 18.

At the hearing on appeal, undersigned counsel for claimant physically showed and read from Form 6059D (Ex. 130) in making oral argument to the panel upon the disparate treatment issue.

Judge Stephens in dissent, while not attaching the label of Equal Protection, found disparate treatment to be unfair:

> The Secretary could avoid one major element of unfairness by requiring that *all persons* entering or leaving the United States be given a written explanation of the reporting requirements before any questions are asked concerning transportation of currency. (emphasis supplied.)
> 804 F.2d at 1091.

The second issue concerning disparate treatment as violating the Equal Protection clause has been raised in the courts below from the beginning of this case and should be grounds for issuing a Writ of Certiorari.

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May, 1987.